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No. _____

In The
Supreme Court of the United States
October Term, 1994

CITY OF DEARBORN,
Petitioner,
v.
RONALD LOSCHIAVO AND DONNA LOSCHIAVO,
his wife,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

THE U.S. DISTRICT COURT RULED THAT PREEMPTION OF A LOCAL ORDINANCE CONCERNING THE HEIGHT AND PLACEMENT OF SATELLITE-DISH ANTENNAS DOES NOT STATE A CAUSE OF ACTION UNDER 42 U.S.C. § 1983, RELYING ON A DECISION WHICH WAS UPHELD BY THE COURT OF APPEALS OF THE NINTH CIRCUIT. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT REVERSED AND HELD THAT 47 C.F.R. § 25.104 DOES CONFER ENFORCEABLE RIGHTS UNDER 42 U.S.C. § 1983. DOES 47 C.F.R. § 25.104 CREATE ENFORCEABLE RIGHTS, PRIVILEGES, OR IMMUNITIES WITHIN THE MEANING OF 42 U.S.C. § 1983?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the City of Dearborn, petitioner, by and through its counsel and files this petition for a writ of certiorari seeking reversal of the Opinion of the Sixth Circuit Court of Appeals.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit, filed on September 8, 1994, is reproduced in Appendix A. *Loschiavo* v. *City of Dearborn*, 33 F.3d 548 (6th Cir. 1994). The court of appeals' subsequent order denying Dearborn's petition for rehearing en banc, filed on November 22, 1994, is reproduced in Appendix B. The federal district court's order granting Dearborn's motion for summary judgment in part, filed on January 9, 1992, is reproduced in Appendix C. The federal district court's order denying the Loschiavos' motion for recon-

sideration, filed on February 11, 1992, is reproduced in Appendix D. The federal district court's order granting the Loschiavos' request for equitable relief, filed on March 17, 1992, is reproduced in Appendix E.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

The Loschiavos' complaint alleged a federal question under the First and Fourteenth Amendments of the United States Constitution as well as a claim under 42 U.S.C. § 1983, § 1988. They filed this cause of action on December 27, 1990.

On January 9, 1992, Hon. Bernard Friedman granted Dearborn's motion for summary disposition to dismiss the claim under 42 U.S.C. § 1983. Reconsideration was requested by the Loschiavos and denied on February 11, 1992. After a bench trial, Judge Friedman granted equitable relief to the Loschiavos to permit them to keep their satellite dish.

The Loschiavos appealed to the Court of Appeals for the Sixth Circuit on April 16, 1992. The City of Dearborn filed a cross-appeal on April 23, 1992.

The Court of Appeals for the Sixth Circuit affirmed the district court's grant of equitable relief to the Loschiavos and reversed the district court's grant of summary judgment to the City of Dearborn on September 8, 1994. Dearborn filed a petition for rehearing en banc on September 21, 1994 in the Court of Appeals for the Sixth Circuit. That petition was circulated to all active judges of the Court of Appeals for the Sixth Circuit. No judge of the court requested a vote on the suggestion for rehearing en banc. The petition for rehearing was subsequently referred to the original hearing panel. The petition for rehearing was denied by

order filed November 22, 1994. This petition for a writ of certiorari was filed within 90 days of the order by the court of appeals denying the petition for rehearing.

FEDERAL AND STATE STATUTES INVOLVED

This petition involves 42 U.S.C. § 1983, 42 U.S.C. § 1988, 47 U.S.C. § 605, 47 C.F.R. § 25.104 and state statutes Mich. Comp. Laws § 125.581, Mich. Comp. Laws § 125.585(11), and Mich. Comp. Laws § 125.590. This petition also involves Dearborn Zoning Ordinance No. 81-33, § 501-e. These laws are reproduced in Appendix F.

STATEMENT OF THE CASE

On October 13, 1990, the Loschiavos erected a receive-only satellite dish antenna in the backyard of their home in Dearborn, Michigan. The antenna is 10′ in diameter and sits atop a 20′ mast, for a total above-grade elevation of 25′. Dearborn's ordinance permits an antenna 8′ in diameter and a total of 12′ above-grade elevation. Dearborn Ordinance No. 81-33, § 501-e.103(e).

The Loschiavos' next-door neighbor notified the City of the installation. After a Dearborn inspector verified the information, the Loschiavos were issued a Notice of Violation (which is a warning, not a citation) for failing to comply with the ordinance. Dearborn's ordinance also requires residents to obtain a permit from the Dearborn Building and Safety Department and approval from the Dearborn Zoning Board of Appeals in order to erect such a structure. The Loschiavos had not followed this procedure.

Following a hearing on November 28, 1990, the Dearborn Zoning Board of Appeals denied the application for a variance to exceed the size and height requirements of the ordinance and ordered removal of the

antenna. At the hearing, the Loschiavos presented no compelling reasons why compliance with the ordinance could not be achieved. Hence, the board's denial was based on the satellite antenna's size and its location in a fully-developed residential neighborhood in which homes are located in close proximity to one another. The Loschiavos' satellite dish is shown in the photograph, admitted at trial as Defendant's Exhibit 8, included as Appendix H.

As a result of the zoning board's action, the Loschiavos filed suit in the United States District Court for the Eastern District of Michigan, contending that the zoning ordinance violated their rights under the First and Fourteenth Amendments. The Loschiavos also claimed that Dearborn's ordinance was preempted by 47 C.F.R. § 25.104. That F.C.C. regulation preempts local zoning ordinances which "impose unreasonable limitations on, or prevent, reception of satellite-delivered signals by receive-only antennas. . . ." 47 C.F.R. § 25.104; Appendix, F-10. The Loschiavos asserted that a private right of action under 42 U.S.C. § 1983 had been created by the fact that Dearborn's ordinance was preempted by the F.C.C. regulation. They sought permanent injunctive relief, declaratory relief, money damages, and other relief deemed appropriate by the court.

The statutory basis of subject matter jurisdiction in the district court was 28 U.S.C. § 1331 because the Loschiavos alleged federal questions with regard to 47 U.S.C. § 605 and 47 C.F.R. § 25.104, in addition to their First and Fourteenth Amendment claims. The district court maintained subject matter jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) over the civil rights action brought under 42 U.S.C. § 1983.

After hearing each party's respective motions for summary judgment on January 9, 1992, the district court held that Dearborn's zoning ordinance did not deprive the Loschiavos of their constitutional rights

under the First and Fourteenth Amendments, and concluded that the F.C.C. regulation at issue did not create enforceable rights, privileges, or immunities within the meaning of 42 U.S.C. § 1983. Accordingly, the district court granted summary judgment in favor of Dearborn on these claims.

A bench trial was held in February 1992 to determine whether the ordinance was preempted by 47 C.F.R. § 25.104. After a trial, the district court ruled that even though the ordinance had a "reasonable and clearly defined health, safety or aesthetic objective," it was preempted by the federal regulation as applied to the Loschiavos. It enjoined the City from enforcing the ordinance as to the Loschiavos.

The Loschiavos appealed the district court's grant of summary judgment in favor of Dearborn to the United States Court of Appeals for the Sixth Circuit. Dearborn then filed a cross appeal concerning the injunction. The court of appeals reversed the district court and held that the Loschiavos have a right to enforce 47 C.F.R. § 25.104 under 42 U.S.C. § 1983. The district court's grant of injunctive relief was affirmed.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' CONCLUSION THAT AN ENFORCEABLE RIGHT UNDER 42 U.S.C. § 1983 FOR PREEMPTION OF A LOCAL ZONING ORDINANCE BY FEDERAL REGULATION 47 C.F.R. § 25.104 EXISTS, IS ERRONEOUS AND CONFLICTS WITH THE DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

In this case, it was held by the district court that 47 C.F.R. § 25.104 preempts Dearborn's ordinance which regulates satellite dish antennas as applied to the Loschiavos. This conclusion was reached after an

exhaustive review of all the pertinent facts presented. The court arrived at this conclusion after the Loschiavos' presentation of testimony at trial which indicated that the presence of mature trees in the neighborhood impeded their ability to comply with the Dearborn ordinance and still receive adequate reception.

While the district court did find that the Dearborn ordinance was preempted by 47 C.F.R. § 25.104, the court declined to find that such preemption gave rise to a cause of action under 42 U.S.C. § 1983. The court based its conclusion upon the holding of *Johnson* v. *City of Pleasanton*, 781 F. Supp. 632 (N.D. Cal. 1991), a similar case originating out of the Ninth Circuit.

As in the case at hand, *Johnson* also involved a municipality's denial of a satellite dish antenna which did not comply with a local ordinance. Like the district court in this case, the *Johnson* court also held that the ordinance was preempted by 47 C.F.R. § 25.104. After a thorough analysis of applicable decisions of this Court, it was held that — even though the ordinance was preempted — no private right of enforcement existed under 42 U.S.C. § 1983. It should be noted that the *Johnson* case was subsequently affirmed by the U.S. Court of Appeals for the Ninth Circuit with respect to this issue and the constitutional claims. *See Johnson* v. *City of Pleasanton*, 982 F.2d 350 (9th Cir. 1992).

In its Opinion, the court of appeals declined to either reject or distinguish *Johnson*. Its silence is troublesome given the district court's reliance on *Johnson*. Furthermore, the court's decision in the case at hand has now created a split of authority on this issue which impacts all municipalities. This problem is further compounded by the lack of uniformity among local ordinances regulating satellite dish antennas. Dearborn respectfully urges the Court to resolve this conflict by adopting the rationale of the Ninth Circuit.

In *Johnson*, the Court of Appeals for the Ninth Circuit affirmed the district court's decision that 47 U.S.C.

§ 605(b) and 47 C.F.R. § 25.104 do not meet the tests set forth in either *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498 (1990) or *Cort* v. *Ash*, 422 U.S. 66 (1975), for establishing the existence of a federal right enforceable under 42 U.S.C. § 1983.

In *Wilder, supra*, this Court set forth three factors which influence whether or not a regulation creates a right enforceable under 42 U.S.C. § 1983:

1. Whether the provision was intended to benefit the plaintiff,
2. Whether the provision creates a binding obligation on the governmental unit rather than merely expressing a congressional preference, and
3. Whether the interest asserted is sufficiently specific as to be within the competence of the judiciary to enforce.

Id. at 509.

Applying both the *Wilder* test and the four-factor test of *Cort, supra*, the *Johnson* court held that the rights and interests created under 47 U.S.C. § 605 are not the kind which Congress intended to be enforced under 42 U.S.C. § 1983. *Johnson*, 781 F. Supp. at 645. The court held that the key in determining whether a statute and/or regulation creates rights enforceable under 42 U.S.C. § 1983 is legislative intent. *Johnson*, 781 F. Supp. at 644, citing *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U.S. 431 (1987).

The *Johnson* court found that the statutory language in 47 U.S.C. § 605 and preemption provisions codified at 47 C.F.R. § 25.104 demonstrate a mere "congressional preference" rather than a mandate. For that reason, the *Johnson* court also held that Section 605(b) does not meet the test set forth in *Wilder* for establishing the existence of a federal right enforceable under 42 U.S.C. § 1983.

In reaching this conclusion, the court considered whether or not the right of access to satellite programming was granted under the statute. The court did not accept the fact that 47 U.S.C. § 605 created a binding obligation on state and local governments. *Johnson*, 781 F. Supp. at 644. It noted that the statutory language in 47 U.S.C. § 605, which was heavily relied upon by the F.C.C. in its adoption of 47 C.F.R. § 25.104, actually conflicted with the F.C.C. regulation. While the *Johnson* court recognized that the statute did create certain rights to receive satellite transmissions, the court also recognized that the F.C.C. regulation permits interference by local governments provided it is justified by health, aesthetic or safety goals, and does not impose unreasonable limitations on the use of the satellite antennas. *Id.* at 644. Because of this conflict, the *Johnson* court held that the legislative intent of the regulation was not to create a binding obligation on local governments but, rather, that the regulation created a mere congressional preference to serve as a guide for local governments when regulating satellite receive-only antennas. The logic, analysis, and conclusion in *Johnson* are sound. The district court in the instant case agreed.

Further support for this position is found in the F.C.C.'s prefatory comments to 47 C.F.R. § 25.104. The F.C.C. refers to this rule as "commission policy," Report and Order, 51 Fed. Reg. 5,519, (F.C.C. 1986), "a general national policy statement," *Id.* at 5,524, "a general policy statement," *Id.* at 5,523-5,524, "guidance as to acceptable limits of governmental action," *Id.* at 5,525, and "the policy adopted herein," *Id.* at 5,525. These are terms which suggest a "congressional preference" rather than the "binding obligation" which is necessary to create a cause of action pursuant to 42 U.S.C. § 1983.

Further proof that the F.C.C. did not intend for its policy to create a new binding obligation or new cause of action, lies in its comment that:

> There has been increased interest and publicity surrounding this issue and *we conclude that the large number of cases which might be presented for individual review would place a severe burden on our administrative process. Satellite antenna users who are dissatisfied with the results of any local zoning decision can use the standards adopted here in pursuing any legal remedies they might have.* (Emphasis added.)

Report and Order, 51 Fed. Reg. 5,519, 5,524 (F.C.C. 1986).

The Court of Appeals for the Sixth Circuit, on the other hand, ignored *Johnson*, and concluded that the F.C.C. regulation at issue creates a binding obligation because it sets forth a "clear command: local governments are not to enforce zoning ordinances which impose unreasonable limitations on the uses of satellite antennas." *Loschiavo*, 33 F.3d at 552; Appendix, A-7.

Unfortunately, while the general command may be clear, the F.C.C. expressly declined to provide any guidance as to the regulation's implementation:

> We decline to attach a list of acceptable sample zoning ordinances. As has been repeatedly stated here, our preemption is intended to afford local communities some flexibility. Moreover, a list of specific rules would be incomplete and could lead to circumvention of our objectives.

Report and Order, 51 Fed. Reg. 5,519, 5,525 par. 43, (F.C.C. 1986).

Absent any guidance from the F.C.C., each city was left to devise its own means to comply with the spirit and intent of this policy. Every ordinance your petitioner has obtained from other cities contains different regulations.

The "unreasonable limitations" at issue here are akin to the "reasonable efforts" at issue in *Suter* v. *Artist M.*, 112 S.Ct. 1360 (1992). There, the Court held that the "rea-

sonable efforts" provision of the Adoption Assistance and Child Welfare Act of 1980 was not enforceable in a private action under 42 U.S.C. § 1983, noting the following:

> No further statutory guidance is found as to how reasonable efforts are to be measured. This directive is not the only one which Congress has given to the States, and it is a directive whose meaning will obviously vary with the circumstances of each individual case. How the state was to comply with this directive, and with the other provisions of the Act, was, within the broad limits left up to the State.

Id. at 1368.

Here, as in *Suter*, the regulation at issue "did not create enforceable rights, privileges, or immunities within the meaning of § 1983." *Suter* at 1366 (quoting *Wright*, 479 U.S. at 423). In both cases, no guidance was provided as to the type of "reasonable" regulation that would be considered acceptable. Instead, each local government body was to achieve compliance in its own manner.

While the court of appeals in the case at hand quoted *Suter*, it failed to apply it to the facts of the case at hand. *Loschiavo* at 551, 552. Given this Court's holding in *Suter*, it is difficult to understand how the court of appeals arrived at its conclusion that the regulation at issue creates the type of enforceable rights, privileges or immunities contemplated by 42 U.S.C. § 1983.

II.

THE COURT OF APPEALS STATED THAT "REASONABLENESS" IS EASILY SUSCEPTIBLE OF JUDICIAL EVALUATION, HOWEVER, IT MADE NO ATTEMPT TO EVALUATE THE REASONABLENESS OF DEARBORN'S ORDINANCE.

In its Opinion, the Court of Appeals for the Sixth Circuit states that "the reasonableness standard is readily susceptible of judicial evaluation." *Loschiavo* at 552, 553; A-8. Yet the court made no attempt to evaluate the reasonableness of Dearborn's ordinance. The F.C.C. regulation at issue requires that Dearborn's ordinance "not operate to impose *unreasonable* limitations on, or prevent reception of satellite-delivered signals by receive-only antennas. . . ." 47 C.F.R. § 25.104 (emphasis added); Appendix, F-10.

Assuming, *arguendo*, that this regulation creates a right, it remains an unanswered question of law whether Dearborn's ordinance violates this regulation. The court of appeals erred in holding that the ordinance was a per se violation of the F.C.C. regulation just because of the Loschiavos' unique circumstances. This assumes, incorrectly, that the vast majority of Dearborn's residents are similarly situated and that their reception of satellite signals is frustrated.

The test of reasonableness of a land use regulation is not whether it is unreasonable for a particular individual. However, the court of appeals' holding in this case appears to have applied such a test. A test of that nature is inconsistent with the analysis in *Pennell* v. *City of San Jose*, 45 U.S. 1 (1988). In *Pennell*, this Court evaluated the reasonableness of a land use regulation (a rent control ordinance) based upon whether it represented a rational attempt to accommodate conflicting interests. The Court examined whether the rent control ordinance attempted to accommodate the conflicting interests of protecting tenants from burdensome rent increases, while at the same time, assuring that landlords are

guaranteed a fair return on their investment in order to determine whether the ordinance was reasonable. *Pennell* at 15.

Here, the court of appeals failed to examine the reasonableness of Dearborn's ordinance in any context except that of the Loschiavo property. The court should have evaluated the reasonableness of Dearborn's ordinance based upon whether it accommodates the interests of satellite antenna users, while at the same time advancing clearly defined health, safety and aesthetic objectives.

The district court made a judicial determination that Dearborn's ordinance had a reasonable and clearly defined health, safety and aesthetic objective. Presumably, the district court did so by taking into account many factors, including the small single-family lot sizes in Dearborn. Understandably, reasonableness is susceptible to interpretation and may vary based on the locale. Accordingly, it was error for the court of appeals to make no evaluation of the reasonableness of Dearborn's ordinance.

III.

THE F.C.C. REGULATION REGARDING AMATEUR RADIO ANTENNAS IS COMPARABLE TO THAT OF SATELLITE-DISH ANTENNAS.

It is foreseeable that the decision in this case will also impact local regulation of amateur radio antennas. The federal regulation concerning amateur radio antennas, PRB-1, reproduced in Appendix G, states as follows:

> This document *declares* a limited *preemption* of state and local regulations which preclude amateur communications. (Emphasis added.)

Declaratory ruling, 50 Fed. Reg., 38,813 (F.C.C. 1985); Appendix, G-1.

The language used in PRB-1 allows for utilization of discretion by local governments equal to that provided in 47 C.F.R. § 25.104 for regulation of satellite receive-only antennas. A comparison of these two regulations reveals that there is really no difference between the preemption set forth in PRB-1 and the preemption set forth in 47 C.F.R. § 25.104.

PRB-1 and the impact it has on local governments was discussed at length in *Howard* v. *City of Burlingame*, 937 F.2d 1376 (9th Cir. 1991). In *Howard*, a variance to increase the height of an amateur radio antenna was denied by the City Council. The City's zoning power was preempted by the federal regulation, but, the court declined to find a cause of action under 42 U.S.C. § 1983 existed. "Howard's preemption victory did not vest him with any enforceable rights under 42 U.S.C. § 1983. This is because the supremacy clause merely safeguards federal interests against state infringement, and operates to preempt state regulatory action without creating individual rights." *Id.* at 1380.

The *Howard* opinion also analyzed the F.C.C. regulation in the context of *Wilder* v. *Virginia Hospital Association*, *supra*, and *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103 (1989). The court in *Howard* determined that neither the Federal Communications Act nor the F.C.C. regulation created any "binding obligations" on the City.

In its opinion, the Court of Appeals for the Sixth Circuit erroneously distinguished *Howard*. The F.C.C. regulation at issue in *Howard* and the F.C.C. regulation in this case respectively preempt local regulations which inhibit amateur radio and satellite antenna communications.

IV.

THIS CASE IS A LAND USE DISPUTE WHICH SHOULD BE LITIGATED IN THE STATE COURT.

Rather than a civil rights action, this case is actually a land use dispute. Adequate state law remedies exist

which the Loschiavos have chosen to disregard. Prior to the court of appeals' Opinion and Judgment, persons aggrieved by local zoning board decisions appealed to the state courts. It is difficult to believe that the F.C.C. intended to create a right to have appeals concerning the height and placement of satellite antenna structures litigated in federal court — especially since the F.C.C. declined further agency involvement in case-by-case reviews due to the large volume of cases anticipated. It is much more likely that the F.C.C. intended satellite antenna users to avail themselves of existing statutory review processes.

A specific state remedy exists to appeal decisions of local zoning boards in the State of Michigan. This remedy is set forth in Mich. Comp. Laws § 125.585. Satellite antennas are indisputably "structures" within in the scope of Michigan's Zoning Enabling Act, Mich. Comp. Laws § 125.581, *et seq.* The state has delegated the regulation of the height and location of structures to the local government. Local zoning boards are established by the Act to consider variances and appeals from those regulations. State circuit courts have express jurisdiction to review those decisions *de novo.*

Since clear and comprehensive state law remedies exist for this type of land use dispute, the City of Dearborn asserted the affirmative defense that this Court's decision in *Parratt* v. *Taylor*, 451 U.S. 517 (1981) effectively barred a cause of action under 42 U.S.C. § 1983. The district court did not base its summary judgment on *Parratt*, relying instead upon *Johnson*, *supra.*

In *Parratt*, *supra*, the Supreme Court ruled that the existence of an adequate state law remedy to redress property damage or deprivation inflicted under color of state law bars a cause of action under 42 U.S.C. § 1983. As explained above, the State of Michigan sets forth an exhaustive procedure for redress in zoning matters before the state circuit court, Mich. Comp. Laws § 125.

585(11); Mich. Comp. Laws § 125.590. Since adequate state court remedies are available to the Loschiavos, as stated by the City of Dearborn in its original answer to this action, an appropriate cause of action under 42 U.S.C. § 1983 has not been brought before the court according to *Parratt, supra.*

In his closing comments in *Parratt, supra,* now Chief Justice Rehnquist, writing for the majority, shed additional light on this issue:

> To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under color of law into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale, any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states.' *Paul* v. *Davis*, 424 U.S. 693, 701, 47 L. Ed. 2d 405, 96 S.Ct. 1155 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

Parratt at 544.

The Loschiavos may argue that *Parratt* should be distinguished because a lost hobby kit, rather than a satellite dish, was at issue. However, the true distinction lies in the fact that in *Parratt* there was some deprivation. Here, the Loschiavos have had the uninterrupted use of their satellite-dish antenna since the day it was installed. In *Parratt*, the Court stated that "in any § 1983

action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Id.* at 553.

The court of appeals did not make this initial inquiry. The Loschiavos do not meet the second element of the inquiry. Therefore, even though they have suffered no deprivation, the court of appeals substantiated their cause of action under 42 U.S.C. § 1983.

Just as Chief Justice Rehnquist feared in *Parratt*, the court of appeals' ruling in the case at hand has paved the way for the federal courts to hear a font of satellite-dish antenna appeals from decisions of local zoning boards.

Justice Marshall observed in a dissenting opinion in *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974), "Our role is not and should not be to sit as a zoning board of appeals."

It could be argued that the court of appeals' opinion, concluding that a cause of action under 42 U.S.C. § 1983 exists will send such a stern warning to local governments that all ordinances will be hastily reviewed and changed to avoid potential liability. However, due to the unique characteristics of each parcel of land and of off-site obstructions to satellite site lines, it is unlikely that a zoning ordinance can be crafted from which a variance will never be requested. Such cases will then present issues of fact which may be litigated in federal court to determine whether an ordinance unreasonably restricts reception. If a local government is exposed to damages and attorney fees in each case, the legitimate exercise of discretion by local zoning boards will cease to exist. This will result in a carte blanche for satellite antenna users which the F.C.C. declined to provide in 47 C.F.R. § 25.104.

The situation in this case is illustrative. Dearborn's regulation permitted many satellite antennas prior to the institution of this lawsuit. The unique characteristics of the Loschiavo property (large off-site trees across the street and several homes away) were not contemplated by the ordinance.

At a hearing before the zoning board of appeals, the Loschiavos did not attempt to educate the board as to their particular reception problems, other than to say that they were having a problem receiving adequate cable reception. The board did not "summarily" deny their appeal, as the court of appeals stated in its Opinion. Rather, the Loschiavos presented no substantive evidence to warrant granting their appeal. The installer of the Loschiavos' antenna did nothing more than argue with the zoning board that Dearborn's ordinance was preempted by the F.C.C. regulation. The court of appeals has essentially rewarded the Loschiavos for withholding pertinent information from the zoning board.

A regulation to accommodate the Loschiavos' satellite antenna would have to permit a height of 25′ above grade. It is unreasonable for the City of Dearborn to be held liable for this lack of foresight inasmuch as the F.C.C. commented "[i]n addition, receive-only antennas usually do not approach thirty feet in height or diameter." 51 Fed. Reg., *supra*, note 19, 5,522.

Rather than provide a regulation which may, in unforeseeable circumstances, subject a local government to damages and fees pursuant to 42 U.S.C. § 1983 and § 1988, it is more likely that the concerns expressed by Commissioner Mimi Weyforth Dawson, dissenting in part from 47 C.F.R. § 25.104, will come home to roost. Commissioner Dawson noted that the majority's rule created an "enormous loophole . . . since blanket bans against all antennas (or blanket bans which grandfather existing antennas) . . . are entirely permissible under the majority's rule." 51 Fed. Reg., *supra*, at 5,526; Appendix, F-11.

A blanket ban against all antennas may seem more prudent than to try to allow and reasonably regulate these structures. The concern is real when, in a unique case such as this, the court of appeals held that the ordinance "improperly trammel[s] an individual's right to satellite reception." *Loschiavo* at 552; Appendix, A-7.

The court's harsh criticism of Dearborn's ordinance was undeserved. The district court reviewed the City's statement of purpose for the ordinance, as well as the ordinance itself, and found that it had a reasonable and clearly defined health, safety or aesthetic objective. Moreover, the district court, after finding that the ordinance was preempted in this specific case, enjoined enforcement of the ordinance only as to the Loschiavos.

V.

THE DECISION OF THE COURT OF APPEALS HAS RADICALLY ENLARGED THE SCOPE OF 42 U.S.C. § 1983.

The court's decision in this case has radically enlarged the scope of 42 U.S.C. § 1983 such that zoning disputes concerning satellite-dish height and placement state a cause of action pursuant to this statute. It is difficult to imagine that this was the intent of the drafters of this statute. In *Wilson* v. *Garcia*, 471 U.S. 261 (1985), Justice Stevens discussed the motivation for the adoption of 42 U.S.C. § 1983 and its predecessors:

> The specific historical catalyst for the Civil Rights Act of 1871 (the predecessor of § 1983) was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights. See *Briscoe* v. *LaHue* 460 U.S. 325, 336-340 L. Ed. 2d 96, 103 S.Ct. 1108 (1983). The debates on the Act chronicle the alarming insecurity of life, liberty and property in the southern states and the refuge that local authori-

ties extended to the authors of these outrageous incidents:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishings have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of public tribunals are searched in vain for any evidence of effective redress. Cong. Globe, 42d Cong, 1st Sess, 374 (1871). (remarks of Rep. Lowe)

By providing a remedy for the violation of constitutional rights, Congress hoped to restore peace and justice to the region through the subtle power of civil enforcement.

Wilson at 276-277.

The state of affairs that existed at the time 42 U.S.C. § 1983 was enacted demonstrates the type of conduct and deprivation of rights that this statute was intended to address. Justice Powell emphasizes this point of view in his concurring opinion in *Parratt*, *supra*, when he refers to 42 U.S.C. § 1983 as a statute "that already has burst its historical bounds." *Id.* at 554. In a footnote explaining this position further, Justice Powell states the following:

> Section 1983 was enacted in 1871 as one of the statutes intended to implement the Fourteenth Amendment. For many years, it has remained a little used, little known section of the Code. In the past two decades, however, resourceful counsel and receptive courts have extended its reach vastly. The statute with a commendable

> purpose no longer is confined to deprivations of individual rights as intended in 1871. As a result, § 1983 has become a major vehicle for general litigation in the federal courts by individuals and corporations.
>
> Professor Christina Whitman recently has addressed this expansion of § 1983 with a comprehensive assessment of arguable pluses and minuses. See Whitman, Constitutional Torts, 79 Mich. L. Rev. 5 (1980). . . .
>
> The societal costs of using this statute for a purpose never contemplated are high indeed: "First, the existence of the statutory cause of action means that every expansion of constitutional rights (through § 1983) will increase the caseload of already overburdened federal courts. This increase dilutes the ability of federal courts to defend our most significant rights. Second, every (such) expansion . . . displaces state lawmaking authority by divesting decision-making to the federal courts."

Parratt, *supra* note 13, at 554.

The Court of Appeals for the Sixth Circuit has previously held that disputes involving local zoning boards are matters within the jurisdiction of the state courts. *Studen* v. *Beebe*, 588 F.2d 560, 566 (1978), citing *City of Eastlake* v. *Forest City Enterprises*, 426 U.S. 668 (1976). It has also recognized that "Section 1983 does not create a federal cause for every wrong committed under color of state law." *Studen* at 568. Contrarily, the court's ruling that a cause of action under 42 U.S.C. § 1983 existed in the present case represents an erroneous expansion of this statute that other courts have recognized was not meant to exist.

CONCLUSION

For the reasons stated above, petitioner asks that a writ of certiorari to the Court of Appeals for the Sixth Circuit issue and that the decision of the Court of Appeals for the Sixth Circuit be reversed.

Respectfully submitted,

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